

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
E-SAT, Inc.)
)
Petition for Rulemaking to Establish)
Rules for Licensing Second-Round)
Applicants in the Non-Voice,)
Non-Geostationary Mobile)
Satellite Service)

File No. RM - _____

DOCKET FILE COPY ORIGINAL

To: Secretary, Federal Communications Commission

OPPOSITION TO MOTION TO DISMISS

E-SAT, Inc., by its attorneys, hereby opposes the Motion to Dismiss filed by Leo One USA Corp. ("Leo One") in the above captioned proceeding on February 26, 1996. Leo One's opposition to E-SAT's Petition for Rulemaking is both perplexing and internally contradictory. The need for a rulemaking to resolve second-round licensing issues is clear and, as comments in this proceeding will bear out, E-SAT's Petition enjoys a great deal of support from the Little LEO community. Far from proving that a rulemaking would be harmful or unnecessary, Leo One's protestations further demonstrate the dire need for a rulemaking.

1. E-SAT's Petition Is Procedurally Sound

In its Motion to Dismiss, Leo One asserts that E-SAT's Petition should be dismissed because it does not comply with the Commission's Rules. Leo One claims that the Petition is premature under §1.401(c) and fails to propose specific rules, warranting dismissal under §1.401(e).

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E-SAT incorporated in its submission - under a heading entitled "Principles to Be Utilized in Processing Second Round Applications" - specific proposals for processing second round applications.¹ Despite the fact that the Petition lists seven specific proposals for new rules, Leo One asserts without justification or precedent that these principals "merely raise issues without offering any specific solutions" and therefore "do[] not provide the 'text or substance' of proposed Rules or even provide a general outline of a proposed Rule or policy."² This assertion proposes a higher standard than has ever been applied by the Commission and one that is not grounded in reason.

A search of Commission rulings dating back 25 years does not reveal a single instance in which a petition for rulemaking was dismissed under Section 1.401(c) for failure to propose specific rules. Section 1.401(c) does not require a petitioner to submit a camera ready version of the proposed rules. It requires only that the petitioner set out the "text or substance" of the proposed rules. Even a perfunctory perusal of E-SAT's Petition reveals that Leo One's claim is specious. The Petition contains more than enough specificity to guide the Commission in crafting a Notice of Proposed Rulemaking. Leo One's desperate resort to this groundless argument merely underlines the inexplicable aversion it has displayed towards this and other attempts at a cooperative, open and reasoned resolution to this proceeding.

Leo One misunderstands the basis for E-SAT's Petition. It claims that "[t]he presumption underlying the petition is that mutual exclusivity exists between the pending NVNG MSS applicants."³ E-SAT was quite clear in

¹ Petition for Rulemaking, filed February 14, 1996 at 9.

² Motion to Dismiss filed by Leo One USA Corp., filed February 26, 1996 at 7.

³ Id. at 4.

explaining the reasons for filing its Petition for Rulemaking, none of which were based on the presumption of mutual exclusivity. As the Petition notes:

The need for a formal rulemaking is driven by the scarcity of spectrum available both domestically and internationally for NVNG MSS.

. . .
A rulemaking is needed to determine how both the Commission, as well as second-round applicants, can negotiate this awkward period until additional allocations are made. If the Commission proceeds by granting individual applications in a piecemeal fashion, the scarcity of spectrum could seriously impede the prospect of another system being deployed until additional spectrum is allocated internationally or domestically for NVNG MSS. Moreover, acting on some but not all applications could result in a violation of the other applicants' right to comparative consideration.⁴

The arguments Leo One makes based on its misunderstanding of the Petition are irrelevant. The financial qualifications of applicants are irrelevant to the determination of the amount of spectrum that is available for allocation to NVNG MSS. Even if the Commission were to follow Leo One's suggestion and apply the first round rules, unless this resulted in the elimination of all but one or two of the eight pending applicants the Commission would *still* need to adopt rules to determine which of the remaining applicants should be licensed.⁵ This process is likely to be delayed by appeals and petitions for reconsideration filed by those eliminated. The net result would be a waste of time, further delay and no net progress in bringing increased competition, services and consumer choice to NVNG MSS. There is no sound reason for the Commission to pursue this course when it can achieve a much better result in significantly less time simply by initiating a rulemaking proceeding now.

⁴ Petition for Rulemaking at 2, 3.

⁵ Because three of the eight second-round applicants are licensees from the first processing round, they cannot be eliminated on financial grounds.

E-SAT agrees with Leo One that a significant component of the determination of how much spectrum is available for NVNG MSS lies in the hands of the Commission. Once this determination is made, however, the Commission must still allocate the spectrum to one or more of the existing applicants. Leo One's claim that spectrum availability issues can be resolved without a rulemaking in no way proves that a rulemaking is not necessary to determine other equally complex and contentious issues, such as how the available spectrum is to be assigned. A status conference hosted by the International Bureau shortly after Leo One's Motion to Dismiss was filed confirmed the difficulty the Bureau would face in processing the second round without a rulemaking. If there was any prior question as to whether this proceeding is ripe for a rulemaking, it is now abundantly clear that it is.

3. A Rulemaking Would Aid, Not Hinder WRC-97 Preparations

Leo One claims that initiating a rulemaking at this point would prolong uncertainty in the licensing process and hinder the ability of applicants to secure international partners, and with them, international support for additional allocations. This superficial argument falters when its premise is brought into the real world.

Leo One is correct in asserting that international partners are needed to secure additional allocations at WRC-97. However, Leo One's belief that one licensee would be more capable of attracting international partners than five applicants (each with their own international contacts) is tenuous at best. Leo One's assertion is based on the assumption that existing processing rules would be sufficient to eliminate all but one of the eight pending applicants in the second round. But it has yet to elucidate how this elimination is to be accomplished. As E-SAT stated in its Petition, selection of one or two licensees from the eight pending second round applicants using the existing rules

cannot be accomplished without violating the rights of the pending applicants.⁶ Until Leo One can establish how this problem can be circumvented, its arguments about the benefit of one full licensee in WRC-97 preparation, as compared to five applicants, are totally irrelevant. The Commission is unable to eliminate lawfully six or seven applicants with existing rules, so talk of the potential benefits of doing so is pointless.⁷

4. Leo One's Own Arguments Demonstrate the Need for a Rulemaking

Leo One asserts in its Motion to Dismiss that immediate processing of the second round should include a determination of "the eligibility of the first round NVNG MSS applicants to participate in the Second Round."⁸ Absent from this argument, however, is any reference to any provision in the first round rules which would allow the Commission to make such a determination. In fact, there is no such provision. The first round rules go so far as to state that while increased competition is desirable "it must not take precedence over our ability to license viable systems."⁹ If Leo One wishes to advocate a different policy, the logical forum for such an argument would be a rulemaking proceeding.

⁶ Petition for Rulemaking at 3.

⁷ Leo One also notes that use of at least one band - the 401 - 406 MHz band - is dependant on the movement of radiosonde operations from this band. In their ITU preparations, the Little Leo community has recognized that this migration can only be accomplished through industry subsidies. Eliminating seven of the eight potential companies would force the remaining licensee to bear this financial burden alone. It is hard to imagine how a single, small, entrepreneurial entity such as Leo One would be better equipped to both negotiate and finance such a costly migration than the combined resources of eight companies.

⁸ Motion to Dismiss at 10 - 11.

⁹ NVNG MSS Licensing Order, 8 FCC Rcd 8450 (1993) at ¶ 21.

Leo One also suggests that the Commission "develop a sharing plan in the 137 - 138 MHz band to accommodate additional entrants."¹⁰ Again, nothing in the first round rules provides adequate guidance for formulating such a plan. While the first round rules discuss possible second-round entry, they are woefully inadequate as a basis for the formation of a band sharing plan. A much more logical avenue would be to solicit comments and proposals for such a band. Leo One's opposition to open and equitable consideration of such rules is inexplicable and unproductive.

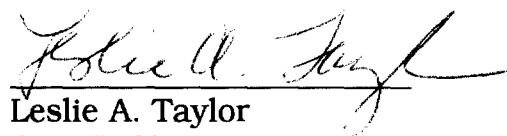
If the Commission is to eliminate second round applicants for financial or other reasons, exclude first round applicants from consideration in the second round, or develop a band-sharing plan that will allow entry of additional licensees, it must do so in an open proceeding that follows the requirements of the law. It cannot, as Leo One appears to advocate, create rules without notice and comment that would affect profoundly the rights of pending applicants.

¹⁰ Motion to Dismiss at 11.

5. Conclusion

For the reasons stated above, the Commission should deny Leo One's Motion to Dismiss and proceed expeditiously with a rulemaking proceeding to establish licensing rules for the second processing round.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Leslie A. Taylor", written over a horizontal line.

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March 6, 1996

Certificate of Service

I, Andrew Taylor, do hereby certify that copies of the foregoing "Opposition to Motion to Dismiss" were sent on this 7th day of March, 1996, by first-class mail, postage prepaid to the following persons.

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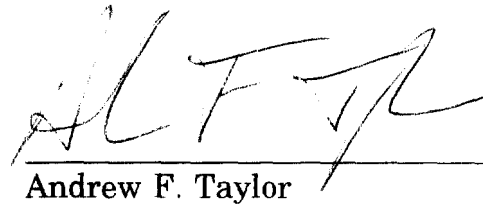
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